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No. 74-996

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

DATA PRODUCTS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Although respondent seemingly acknowledges (Br. Opp. 4, 7) the conflict between the decision below and that of the Fourth Circuit in *Mutual Assurance Society of Virginia Corp.* v. *Commissioner*, 505 F.2d 128, and the fact that at least $30 million of revenue is at stake, it nevertheless denies that the issue is sufficiently important to warrant review by this Court. But as we pointed out at page 11 of our petition for a writ of certiorari in *United States* v. *Foster Lumber Co.*, No. 74-799, which presents the identical issue, even the $30 million figure does not reflect additional amounts which are expected to arise as a result of the attempts of taxpayers to claim net operating loss carryover deductions for succeeding years on the ground that portions of such losses are still available to offset income.

That fact is dramatically illustrated by the pertinent figures in this case, where $152,451 is at stake for the taxable year in suit but an additional claimed loss carryover of $5 million is ultimately at issue. As respondent acknowledged at page 4 of its petition for a writ of certiorari in this case (No. 854), which has now been dismissed pursuant to stipulation, "it has an unused carryover in excess of $5,000,000.00 which will be available as a deduction in other taxable years if the decision below is affirmed but none of which would be so available if the views of the United States were ultimately to prevail." The question thus involves much more than $30 million of revenue.

Respondent further suggests (Br. Opp. 5, 6): (1) that the Fourth Circuit may alter its views in a subsequent case; and (2) that consideration of this question presented would require "an examination of a goodly portion of the entire Internal Revenue Code."

1. There is no basis for respondent's prediction that the Fourth Circuit may change its position in a subsequent case. Its decision in *Mutual Assurance Society of Virginia Corp.* v. *Commissioner, supra*, rendered just five months ago, is the most recent opinion of a court of appeals on the issue in which it expressly recognized the conflict and explicitly rejected the reasoning of both the Tax Court in *Chartier Real Estate Co.* v. *Commissioner*, 52 T.C. 346, 356-358, affirmed *per curiam*, 428 F.2d 474 (C.A. 1), and of the Eighth Circuit in *United States* v. *Foster Lumber Co.*, 500 F.2d 1230, petition for a writ of certiorari pending, No. 74-799.[1] More recently, the

[1]The opinions of the First and Ninth Circuits, which respondent (Br. Opp. 5) characterizes as "harmonious," are merely *per curiam* affirmances. *Chartier Real Estate Co.* v. *Commissioner*, 428 F.2d 474 (C.A. 1); *Olympic Foundry* v. *United States*, 493 F.2d 1247 (C.A. 9); and the decision below (Pet. App. B 2a).

Fourth's Circuit's views have been cited with approval by the Sixth Circuit in *Axelrod* v. *Commissioner*, No. 74-1511, decided December 17, 1974, reversing 32 T.C.M. 885 (decided August 25, 1973), a case involving the computation of a net operating loss of an individual taxpayer. There is accordingly a live conflict of decisions which only this Court can resolve.

2. Consideration of the question will not require "a complete examination of the entire history of the capital gains provisions and the net operating loss provisions of the taxing statute, [and] * * * an examination of a goodly portion of the entire Internal Revenue Code" (Br. Opp. 6). The issue is simply not that complicated or wide-ranging. It involves only the interplay between Section 172 of the Code, which provides for the carryback of a net operating loss, and Section 1201, the alternative tax computation for capital gains.

In upholding our position that a loss carryback is "used" by a taxpayer to the extent it offsets *both* the ordinary income and capital gains for the prior year rather than only the ordinary income for that year, the Fourth Circuit in *Mutual Assurance Society* construed the term "taxable income" in Section 172(b)(2) in conformity with its definition in Section 63(a), to include both ordinary income and capital gains (see 505 F.2d at 133-134). It is the meaning of that term in the loss carryback provision that is the issue in this case, and resolution of that issue does not require analysis of "a goodly portion of the entire Internal Revenue Code."

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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